



DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205-AB61

Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Delay of Effective Date

AGENCY: Employment and Training Administration

ACTION: Final rule; delay of effective date.

SUMMARY: The Department of Labor (Department) is delaying the effective date of the Wage Methodology for the Temporary Non-agricultural Employment H-2B Program; Final Rule, 76 FR 3452, Jan. 19, 2011, (the Wage Rule) to January 1, 2012 in response to recently enacted legislation that prohibits any funds from being used to implement administer, or enforce the Wage Rule before January 1, 2012. The Wage Rule revised the methodology by which we calculate the prevailing wages to be paid to H-2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H-2B status.

DATES: The effective date of the rule amending 20 CFR part 655, published at 76 FR 45667, August 1, 2011, as further amended at 76 FR 59896, September 28, 2011, is delayed until January 1, 2012.

FOR FURTHER INFORMATION CONTACT: William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number). Individuals with hearing or speech impairments may

access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

The Department of Labor (Department) published the Wage Methodology for the Temporary Non-agricultural Employment H-2B Program; Final Rule (the Wage Rule) on January 19, 2011, 76 FR 3452. The Wage Rule revised the methodology by which we calculate the prevailing wages to be paid to H-2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H-2B status. The Department originally set the effective date of the Wage Rule for January 1, 2012. However, due to a court ruling that invalidated the January 1, 2012 effective date of the Wage Rule,¹ we issued a Notice of Proposed Rulemaking (NPRM) on June 28, 2011, which proposed that the Wage Rule take effect 60 days from the date of publication of a final rule resulting from the NPRM. 76 FR 37686, June 28, 2011. After a period of public comment, we published a Final Rule on August 1, 2011, which set the new effective date for the Wage Rule of September 30, 2011 (the Effective Date Rule).

Both the Wage Rule and the Effective Date Rule recently were challenged in two separate lawsuits² seeking to bar their implementation. In consideration of the two pending challenges to the Wage Rule and its new effective date, and the possibility that the litigation

¹ CATA v. Solis, Dkt. No. 119, 2011 WL 2414555 (E.D. Pa. June 16, 2011).

² See Louisiana Forestry Association, Inc., et al (LFA) v. Solis, et al, Civil Docket No. 11-1623 (WD LA, Alexandria Division); and Bayou Lawn & Landscape Services, et al (Bayou) v. Solis, et al, Civil Docket No. 11-445 (ND FL, Pensacola Division).

will be transferred to another court,³ the Department issued a final rule, 76 FR 59896, September 28, 2011, postponing the effective date of the Wage Rule from September 30, 2011, until November 30, 2011, in accordance with the Administrative Procedure Act, 5 U.S.C. 705.

On November 18, 2011, President Obama signed into law the Consolidated and Further Continuing Appropriations Act, 2012, which provides that “[n]one of the funds made available by this or any other Act for fiscal year 2012 may be used to implement, administer, or enforce, prior to January 1, 2012 the [Wage Rule].” Public Law No. 112-55, Div. B, Title V, § 546 (Nov. 18, 2011). While the Act prevents the expenditure of funds to implement, administer, or enforce the Wage Rule before January 1, 2012, it does not prohibit the Wage Rule from going into effect, which is scheduled to occur on November 30, 2011. When the Wage Rule goes into effect, it will supersede and make null the prevailing wage provisions at 20 CFR 655.10(b) of the Department’s existing H-2B regulations, which were promulgated under Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes; Final Rule, 73 FR 78020, Dec. 19, 2008 (the H-2B 2008 Rule). Allowing the Wage Rule to go into effect as planned on November 30, 2011, would therefore render the Department unable to issue prevailing wage determinations under the 2008 H-2B Rule, because it would no longer exist.

³ On September 19, 2011, the plaintiffs in the CATA litigation moved to intervene in the LFA litigation, and also moved to transfer venue over the litigation to the Eastern District of Pennsylvania, the court in which the CATA case remains pending. The plaintiffs’ motion to intervene was granted by the U.S. District Court in the Western District of Louisiana on Sept, 22, 2011, but its motion before the U.S. District Court in the Northern District of Florida remains pending.

Although dates of need are not included in prevailing wage determination requests, it is possible that some of the pending requests with the Department would cover work to be performed before January 1, 2012, and accordingly, the wage would need to be determined in accordance with the 2008 H-2B Rule. However, if the Wage Rule were to go into “effect” on November 30, 2011, we would be legally precluded during the month of December 2011 from issuing prevailing wage determinations under the H-2B 2008 Rule. This result would be directly contrary to Congressional intent as expressed in its Conference Report that “[i]n making prevailing wage determinations for the H-2B nonimmigrant visa program for employment prior to January 1, 2012, the conferees direct the Secretary of Labor to continue to apply the [H-2B 2008 Rule]” H.R. Rept. No. 112-284 (Conf. Rep.), 157 Cong. Rec. H7528 (Nov. 14, 2011). Because of the imminent threat that the Department will be unable to issue prevailing wage determinations for work to be performed before January 1, 2012, the Department considers this situation an emergency warranting the publication of a final rule under the good cause exception of the Administrative Procedure Act. See 5 U.S.C. 553(b)(B) and 553(d)(3). Accordingly, we must further delay the effective date of the Wage Rule to January 1, 2012.

Based on Congressional intent and to avoid an operational hiatus during the month of December 2011, the Department finds good cause to adopt this rule, effective immediately, and without prior notice and comment. See 5 U.S.C. 553(b)(B) and 553(d)(3). We believe that immediate action must be taken so that the employment of H-2B workers will not

adversely affect U.S. workers similarly employed, and that employers are able to obtain a temporary non-agricultural workforce where there are no U.S. workers available for the job. The Department is simply effectuating the intent of Congress that the H-2B 2008 Rule should continue to govern prevailing wage determinations for employment before January 1, 2012. As such, a delay in promulgation of this rule past the date of publication would be impracticable and unnecessary and disrupt the program to the detriment of the public interest.

SIGNED: at Washington, D.C. November 23, 2011.

Jane Oates

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Billing Code: 4510-FP-P

[FR Doc. 2011-30781 Filed 11/25/2011 at 11:15 am; Publication Date: 11/29/2011]